Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

WILLIAM B. BURLEIGH,

Petitioner,

v.

COUNTY OF MONTEREY,
A Public Entity, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1999, Petitioner applied to the Monterey County (California) Planning and Building Department (County) for permits to construct a 504 sq.ft. caretaker's home on his building site in Big Sur, California. After three and a half years, and almost $30,000 in fees, he received all required permits and commenced construction. He wrote an article (Article) for the paper criticizing the Department for delays, abusive conduct and excessive costs. Nine days after circulating the Article to the Department for comment before publication, his construction site was shut down, red tagged. No notice was given Petitioner, nor was he given an opportunity to be heard, or appeal. Many additional conditions were imposed on Petitioner by the Department, including an order to restore the property to its original condition. Petitioner appealed that order to the Planning Commission, and his appeal was denied. He did not appeal the denial to the next level, the County's Board of Supervisors.

On October 8, 2003, the County brought suit against Petitioner, alleging a public nuisance, etc. Petitioner cross-complained against the County and individuals in a suit under the provisions of 42 U.S.C. 1983, alleging retaliation for writing the Article, and claimed denial of equal protection, due process and freedom of speech.

QUESTION PRESENTED – Continued

The County moved to dismiss Petitioner's Cross-complaint for failure to exhaust his administrative remedies by appealing the Planning Commission's denial. The trial court granted the motion, and dismissed all of Petitioner's 1983 causes of action, on the grounds of failing to exhaust his administrative remedies by further appeal. The trial court also found for the County on its lawsuit against Petitioner, and issued the requested injunction. Petitioner was not allowed to testify or present evidence at his court trial, also on the grounds of failure to exhaust administrative remedies.

The Planning Commission did not have jurisdiction, inter alia, over Petitioner's 1983 constitutional claims, so no further appeal or exhaustion of remedies was necessary. *Public Employment Relations Board v. Superior Court,* 13 Cal. App. 4th 1816, 1827 (1993), adding: "To this list [of exceptions to the rule of exhaustion of remedies] must be exceptions where important questions of constitutional law or public policy governing agency authority are tendered. (*Ibid.*) Emphasis added. In addition, Petitioner did not have to exhaust his administrative remedies because the Planning Commission was not capable or qualified to determine complex issues of constitutional law.

QUESTION: Whether the doctrine of exhaustion of administrative remedies can defeat constitutional claims under 42 U.S.C. 1983, when the administrative body, the Planning Commission, did not have jurisdiction and no exhaustion by appeal was required.

LIST OF PARTIES

The name of Petitioner is:

William B. Burleigh

The names of Respondents are:

County of Monterey, a Public Entity, and Scott Hennessey, Alana Knaster, Bill Dunn, Jeff Main, Lautaro Echiburu, and John Floyd. All respondents are represented by the County Counsel's office for Monterey County.

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PETITION FOR WRIT OF CERTIORARI

Petitioner William B. Burleigh petitions the Court for a Writ of Certiorari to review a final judgment of the Court of Appeal of the State of California, Sixth District, filed on October 5, 2010, affirming the judgment of the Superior Court of California, Monterey County, rehearing denied October 26, 2010, Petition for Review by the Supreme Court of California denied on December 15, 2010.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Sixth District (Elia, Mihara, and McAdams) is not published and is included in the Appendix (App., *infra*, at 1). The final judgment of the Superior Court of the State of California, Monterey County, is not published, and is reproduced in the Appendix (App., *infra*, at 37).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal of the State of California, Sixth District, was entered October 5, 2010. Petition for Rehearing was denied October 26, 2010. Petition for Hearing was denied by the Supreme Court of the State of California, and became final December 15, 2010. The jurisdiction

of this Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law . . . abridging the freedom of speech. . . .

U.S. Const. amend. XIV, Sec. 1:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . ; nor shall any State deprive any person of life, liberty or property without due process of law. . . .

42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

The California Court of Appeal set out the procedural history of this case, and some of the facts, in its "Background" but neglected to include most of the facts necessary to support Petitioner's arguments, primarily retaliation by the County for writing a critical article in the newspaper. In his Petition for Rehearing Petitioner requested that the court include the missing undisputed facts in its decision. The Petition was denied October 26, 2010. Having requested it in a Petition for Rehearing, the facts may be considered by a higher court. Accordingly, Petitioner sets out here a condensed statement of facts that were never disputed by the County. (Rule 8.500(c)(2).) This case is fact driven, and these facts are critical to the issues. The retaliation against Petitioner by the County was not only egregious but extensive, and, of necessity, requires a lengthy Statement of Facts. Petitioner was a percipient witness of all the facts.

CONDENSED STATEMENT OF *UNDISPUTED* FACTS

Petitioner seeks to build a 504 sq.ft. caretaker's cottage on his building site in an isolated and remote part of Big Sur, California. (I CT 61-62, 68).

Petitioner applied for approval to build the home in 1999, received a Coastal Development Permit in 2002 (I CT 61-66), and Building Permit in 2003

(Augment 1-2). Construction began and the foundation was started. Petitioner wrote an Article for the paper, hereinafter Article, criticizing the County Planning Department for abuses, excessive fees of almost $30,000, and delays of three and a half years.

Nine days after Petitioner distributed the typewritten Article (III CT 643-650) to Planning Department and County officials, inviting comment before submitting for publication (III CT 640-643), Petitioner's property was red tagged, work stopped, and employees sent home indefinitely. (I CT 48; I CT 133-136; III CT 616-622). Petitioner was given no notice, no opportunity to be heard or correct, and no right to appeal. It took Petitioner four phone calls to determine what had happened to his employees. (I CT 48). Six days later, Petitioner received a violation notice letter from the County setting forth the three reasons for the Red Tag: depositing dirt around the base of small trees, damaging a 14" diameter redwood tree, and grading without a permit. (I CT 133-135; I CT 190-194). All reasons were eventually conceded by the County as being without merit. (Augment 141-142; 166; III CT 616-622).

The Article, condensed to 2,000 words for space demands, was published on April 11, 2003. During the next several weeks the County alleged that Petitioner had started construction on a 30% slope, and mislocated a redwood tree and the building foundation on the plans. On April 8, 2003, the County ordered Petitioner to restore his property to its original condition: hire a civil engineer to prepare a plan

to remove the foundation, re-grade the site, and plant grass and bushes, etc. (I CT 138-140). Petitioner appealed this order to restore to the Planning Commission, in part because the alleged violations were not part of the Restoration Ordinance. Petitioner was not aware at this time that the allegations were untrue. (Augment 141-142; 166; 177; I CT 193-196; III CT 616-622).

Pending the hearing of the appeal to the Planning Commission, after the publication of the Article and the Red Tag, Petitioner was further ordered, in retaliation for publishing the Article:

> 1. To get a third erosion control plan, this time prepared by a civil engineer, even though Petitioner had an erosion control plan on his approved plans, prepared by a licensed architect, had earlier complied with the County's erosion control orders, and even though the County's ordinance exempts Petitioner's property; 2. He was ordered to get a setback variance even though none was required for the original permit; 3. He was ordered to start the application process all over again; 4. He was ordered to reflag (orange netting) the site [first flagging cost $1,250]; 5. He was ordered to get a second geotechnical report [the first cost $8,500]; 6. He was ordered to return to the local land use advisory committee [the first permit required six hearings]; 7. He was ordered to get a fourth expert opinion regarding the safety of the 14 inch diameter redwood tree, this time by an arborist; 8. He was ordered to get a $20,000

> geology report, even though none was required for the original permit; 9. He was ordered to return to the Planning Commission for permit amendment permission, even though this had never been required before for any other applicant; 10. He was ordered to pay additional fees of almost $11,000; (I CT 237-238; Augment 38; III CT 616-622).

The Planning Commission hearing was October 29, 2003. Petitioner's appeal of the order to restore was denied and the order remains in effect. (I CT 255-256; III CT 751).

In response to a demand for production of documents, the County stipulated that it had no records of any other applicant being treated like Petitioner. (I Reporters Transcript (hereinafter I RT) 89-121) (2 CT 508; III CT 616-622). The stipulations referred to in the RT can be found at III CT 658-664 and include numerous documents demanded by Petitioner that show County action: red tags, restoration orders, variances, erosion control, arborist reports, re-flagging, etc. (I CT 194-196; III CT 616-622).

None of the alleged violations by Petitioner involved anything illegal: the setbacks, slope, trees, etc., were all legal on the site plan. (I CT 80-83; II CT 442-447; III CT 616-622).

Petitioner was ordered to complete his erosion report and erosion control by October 15, 2003. Petitioner's hearing on appeal to the Planning Commission regarding the order to restore was set for

October 29, 2003. On October 8, 2003, before the erosion report deadline expired, and before his appeal hearing, the County sued Petitioner to abate and enjoin the same code violations involving erosion, and that were set for hearing before the Planning Commission. *See* County's complaint for injunction (I CT 1) and April 8, 2003, order to restore. (I CT 138-140). This lawsuit was the first time the County had sued a property owner for an injunction because of an alleged zoning violation. (Augment 148; 188). On October 29, 2003, the Planning Commission denied Petitioner's appeal. Petitioner did not appeal any further. (I CT 255-257).

Petitioner filed a Cross-complaint against the County and specified individuals, with causes of action under 42 U.S.C. 1983, including denial of due process, equal protection and freedom of speech.

Petitioner examined, in response to discovery, 291 zoning violation enforcement files, all in the 2003 time frame. These 291 were mostly chosen at random from 684 zoning violation files. In these zoning violation cases, none of the property owners were ordered to restore their property, none were ordered to get a variance, or ordered to get expert reports, none of these cases required the owner to return to the advisory committee, none required the payment of fees in excess of $500, none required re-flagging, none required a geologist report, none required an arborist report, and none were sued for an injunction. There were 270 files of violations that were closed with no

action at all. The rest were closed with a small fine and a thank-you letter for compliance. (III CT 620).

The County filed a Motion for Summary Judgment against Petitioner's Cross-complaint. (II CT 350). The Trial Court granted Summary Adjudication (III CT 739) (App., *infra*, 44 at 3) dismissing the first four counts of Petitioner's Cross-complaint (the first three being 42 U.S.C. 1983 counts, the fourth involving State Prop. 13 Excessive fees for Revenue) on the grounds that Petitioner failed to exhaust his administrative remedies.

Petitioner is not now, and has never been, in violation of any ordinance or permit condition. All prior allegations of violations have been conceded by the County to have no merit. (Augment 141-146; III CT 617, 618, 621; Augment 166; Augment 177).

The County's complaint for injunction was set for court trial on October 8, 2008. The County moved to prohibit Petitioner from testifying or presenting evidence and to permit the County's evidence to be limited to the record of the Planning Commission hearing to restore five years earlier. The motion was granted on the grounds that Petitioner failed to exhaust his administrative remedies in 2003. No evidence was presented showing that Petitioner was in violation of any ordinance or permit condition. The only evidence of violations was the Planning Commission findings which were later found to have no factual merit. In addition, the evidence from the Planning Commission was from October 28, 2003,

three weeks after the Complaint for injunction was filed. (Augment 141-146). No one was sworn at the trial and the only evidence was the administrative record of the Planning Commission hearing. Petitioner was not allowed to testify at his bench trial. Judgment was thereafter entered enjoining Petitioner and ordering restoration of the property. (III CT 784-787; III CT 684-688; App., *infra*, 36). The order was signed, stating that Petitioner was presently in violation, even though the County was unable to offer any evidence of any violation of an ordinance or permit condition, except for the discredited three issues found by the Planning Commission five years before.

The Cross-complaint against the individual defendants in their private capacity was set for jury trial on August 24, 2009. The County moved to prohibit Petitioner from testifying about the evidence, including evidence of the primary issue in the case, retaliation. The motions were granted. Petitioner then stipulated to dismiss, without prejudice, the pending action against the remaining defendants. Judgments were entered accordingly (III CT 771-772) on August 21, 2009, for both the County's complaint against Petitioner and Petitioner's Cross-complaint against the County, (App., *infra*, 36) and the appeal filed timely on October 19, 2009. (III CT 789).

On appeal, the California Court of Appeal held that Petitioner failed to present his 1983 Constitutional claims to the Planning Commission for decisions, and was barred from proceeding to court on the

1983 claims by the doctrine of exhaustion of administrative remedies. (App., *infra*, 22, 23, 27, 36 at 38, 42 at 44.3).

In a separate argument to the Court of Appeal, Petitioner asked the court to excuse failure to exhaust remedies because Petitioner's claims "... present important questions of constitutional law or public policy governing agency authority." *Public Employment Relations Board v. Superior Court*, 13 Cal. App. 4th 1816, 1827. This issue was not considered by the Court of Appeal. In his Petition for Rehearing, Petitioner requested the Court of Appeal to consider this argument but the Petition was denied.

REASON FOR GRANTING THE WRIT

The doctrine of exhaustion of administrative remedies cannot defeat 42 U.S.C. 1983 constitutional claims of denial of due process, freedom of speech, and equal protection by reason of retaliation by the County for Petitioner's writing an article critical of the Planning Department.

The California Court of Appeal gave priority to an administrative procedure, exhaustion of administrative remedies, over 42 U.S.C. 1983 Constitutional claims. No authority was cited. Apparently no prior court has so ruled. It does not appear that this Court has ruled on this subject.

Petitioner's Cross-complaint in this case was founded on 42 U.S.C. 1983, primarily violations of due process, equal protection and freedom of speech. The Statement of the Case, supra, details undisputed facts that show the County retaliated against Petitioner for writing an article in the newspaper criticizing the County Planning and Building Department. There is no other reasonable inference to be drawn from the facts of the County employee's conduct under color of law.

The Court of Appeal, in its statement of facts in the "Discussion" (App., *infra*, 2 et seq.), does not include most of the critical facts in support of Petitioner's arguments, particularly the facts proving retaliation by the County. In Petitioner's Petition for Rehearing to the Court of Appeal, this subject was raised and Petitioner requested inclusion of the missing facts. The Petition was denied, but under Cal. Rules of Court, the facts have been "salvaged" for further appeals.

The trial court found, and the Court of Appeal affirmed, that Petitioner should have presented his constitutional claims to the County Planning Commission at his hearing on an appeal of an administrative order to restore the site to its original condition. Failing to do so was a failure to exhaust his administrative remedies and Petitioner was barred from asserting his claims in court. (App., *infra*, 22, 23, 27, 36 at 38, 42 at 44.3).

The administrative body, the Planning Commission, would have had to decide whether or not

Petitioner was denied due process of law, denied equal protection of the law and freedom of speech, by reason of retaliation against Petitioner for publicly criticizing the Department. In addition, the Planning Commission would have to decide whether or not Petitioner was entitled to compensation and attorney fees, and how much, and should the County be enjoined from enforcing specified ordinances, thereby requiring a determination by the Commission whether or not specified ordinances were unconstitutional facially or as applied, in violation of Petitioner's constitutional rights, etc. The lower courts did not cite any law in support of this position. The Planning Commission was not equipped to handle the trial of these issues. It did not have jurisdiction. It could not provide a remedy to Petitioner's claims.

It is normally required that a person exhaust his or her administrative remedies before proceeding with an independent, collateral action in court. *Briggs v. City of Rolling Hills*, 40 Cal. App. 4th 637 (1995). Exhaustion of remedies is a good rule and it eliminates a lot of unnecessary litigation. It is not, however, as simple as it appears. There are exceptions to the exhaustion doctrine. *Unnamed Physician v. Board of Trustees*, 93 Cal. App. 4th 607, at 620 (2001). "Exceptions are commonly recognized when the administrative remedy is not available, when it is inadequate, or when it would be futile to pursue it. (*Ibid.*) Other exceptions include situations where the agency indulges in unreasonable delay . . . , when the subject matter lies outside the administrative agency's jurisdiction, [or] when pursuit of an administrative remedy would result in irreparable harm. . . ."

Green v. City of Oceanside, 194 Cal. App. 3d 212, 222 (1987); *accord, Public Employment Relations Board v. Superior Court*, 13 Cal. App. 4th 1816, 1827 (1993), adding: "To this list must be exceptions where important questions of constitutional law or public policy governing agency authority are tendered. (*Ibid.*) (Emphasis added.) Exhaustion of administrative remedies before going to court is sometimes required and sometimes not. Although the courts often quote from [*Myers*], 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted,'. . . the quoted words are false almost as often as they are true." 4 Davis, Treatise, *supra*, § 26:1, p. 414; *also see* Reed, *Exhaustion*, *supra*, at pp. 1066-1067, suggesting that the broad language in *Abelleira* is unfortunate and, at p. 1096: "The California exhaustion doctrine was largely derived from a federal doctrine which was neither as clear nor as settled as the California court seemed to believe." *Public Employment Relations Board, supra*, at 1827.

Further, from the same court, citing Davis with approval: "When . . . the lack of jurisdiction clearly appears from considerations that are not within the agency's specialized understanding, exhaustion should not be required." 4 Davis, Treatise, p. 432. (Emphasis added.)

Petitioner also did not have to appeal the Planning Commission decision because the County chose a different remedy, the injunction lawsuit filed three weeks before the Planning Commission hearing. The

Planning Commission hearing became moot because of the prior lawsuit on most of the same issues.

On the issue of retaliation being a denial of Petitioner's 1983 rights, *see Carpenteria v. Santa Barbara*, 344 F.3d 822 (9th Cir. 2003); *also Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

There are several additional reasons why Petitioner should not have been barred by the exhaustion of remedies doctrine, and will be raised if this Court requests.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF MONTEREY, et al., Plaintiffs, Cross-Defendants and Respondents, v. WILLIAM B. BURLEIGH, Defendant, Cross-Complainant and Appellant.	H034942 (Monterey County Super. Ct. No. M67206) (Filed Oct. 5, 2010)

Appellant William Burleigh appeals from a judgment declaring his property a public nuisance and issuing a permanent injunction in favor of the County of Monterey, in an action arising from appellant's violation of the conditions of a permit for the development of a caretaker's unit on his property. He also seeks review of a judgment against him on his cross-complaint against the County and several

County employees. Appellant raises numerous issues pertaining to the County's action and his cross-action, asserting error in the grant of summary adjudication, the denial of his motion to enjoin enforcement of County zoning ordinances, unfavorable in limine rulings, and the award to him of discovery sanctions against the County. We find no error, however, and therefore must affirm the judgments in favor of the County and the individual cross-defendants.

Background[1]

Appellant obtained a Coastal Development Permit in September 2002 and a building permit on January 29, 2003 to construct a caretaker's unit on his property. On March 4, 2003, however, he received a letter from the Planning and Building Inspection Department (Planning Department or Department), notifying him that during a site visit on February 28 its staff had discovered that an excavation into the hillside had damaged a redwood tree, and loose material had been deposited at the base of several

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[1] The County contends that none of appellant's contentions is reviewable on appeal because he has failed to produce an adequate record for this court's review. Evidently the County assumes that the asserted deficiency makes it unnecessary to provide its own statement of facts or procedural history. While a recital of the history of the appeal is not required for a respondent's brief by the Rules of Court, it is helpful, particularly when, as here, the respondent maintains that the appellant is making unsupported factual assertions and attempting to "skew the record."

trees and shrubs around the construction site. According to the letter, the excavation constituted a violation of a County zoning ordinance and two permit conditions, which required protection of the redwood tree and proscribed deposits of excavated material under the driplines of any tree or shrub on the property. To abate the violations appellant would have to (1) remove the excavated material and place it away from trees and shrubs with erosion control measures in place; (2) submit a report from a certified biologist regarding the prognosis for the redwood tree; and (3) apply for an amendment to his permit to include all development not included in the plans previously approved.

Appellant believed that the violations were trivial, the result of an innocent mistake, and that they could be remedied by an administrative amendment of his coastal permit. The Planning Department disagreed, however, and referred appellant to the Planning Commission to appeal the Department's restoration requirement. Appellant did appeal to the Planning Commission, which conducted a hearing on October 29, 2003. The Staff Report in preparation for that hearing noted that appellant had complied with the three requirements the Department had imposed in the March 4 letter. However, in the course of evaluating appellant's application for a permit amendment, staff discovered additional violations with respect to the location of the building and the degree of the hillside slope. Staff had proposed an alternative solution that would obviate restoration of the site and

continue the permit amendment process, but they had not received the application materials necessary to effect this alternative. Consequently, the Department proceeded with its effort to enforce the restoration demand.

In its October 29, 2003 decision, the Planning Commission determined that the Planning Department had acted within the authority conferred upon it by the applicable zoning ordinance. It specifically found that the Department had correctly required restoration of the site to its pre-violation state, based on the location of the redwood tree relative to the building site, location of the building relative to property lines, and placement of the building on slopes in excess of 30 percent.

The written decision concluded: "THIS APPLICATION IS APPEALABLE TO THE BOARD OF SUPERVISORS. IF ANYONE WISHES TO APPEAL THIS DECISION, AN APPEAL FORM MUST BE COMPLETED AND SUBMITTED TO THE CLERK OF THE BOARD OF SUPERVISORS ALONG WITH THE APPROPRIATE FILING FEE ON OR BEFORE NOV 17 2003. [¶] THIS APPLICATION IS ALSO APPEALABLE TO THE COASTAL COMMISSION. UPON RECEIPT OF NOTIFICATION OF THE DECISION BY THE BOARD OF SUPERVISORS, THE COMMISSION ESTABLISHES A 10 WORKING DAY APPEAL PERIOD. AN APPEAL FORM MUST BE FILED WITH THE COASTAL COMMISSION." Lastly, the decision noted that "*if this is the final administrative decision*," it was subject to judicial

review under Code of Civil Procedure sections 1094.5 and 1094.6, governing writs of review applicable to final administrative orders. Appellant was warned that any petition for a writ of administrative mandate had to be filed within 90 days of the date the decision was final.

Appellant did not seek review of the Planning Commission's decision either by appeal to the Board of Supervisors or through a writ of administrative mandate in superior court, as he believed that either course of action "would be futile and useless." In appellant's view, the Planning Commission's decision was limited to the issue of restoration and "did not consider [or] mention" constitutional issues involving free speech or due process. Following the decision, the County had imposed numerous additional requirements, which were outside the scope of the decision and which would be costly and time consuming to implement. Appellant was convinced that the County was retaliating against him for publishing an article in the local newspaper highly critical of the County's conduct during the period preceding acquisition of his permit. Appellant believed that an appeal or writ petition would not allow him to "vindicate" his retaliation claims.

Meanwhile, the County filed a complaint in superior court on October 8, 2003, seeking a declaration that appellant had maintained a nuisance on his property, in violation of the conditions of his building permit. The County also requested an injunction

requiring appellant to correct the violations or "abate all conditions" creating the nuisance.

According to the complaint, a field inspection on February 28, 2003 had revealed that appellant "had caused damage to a protected redwood tree, had placed excavated soil a[t] the base of several trees, and had illegally cut into the hillside where the unit was to be constructed." By cutting into the hillside on which the unit was to sit, appellant had allegedly created a danger that during the seasonal rains a slide would occur, thus blocking or destroying the road below, which was the only access to the surrounding residential area. Appellant had been given the option of restoring the site to its pre-construction condition or seeking an amendment of his permit.

The County alleged that appellant had nevertheless refused to restore the site, seek amendment of the building permit, or agree to an alternative proposed by the County to partially restore the site. Appellant had also refused to provide erosion control plans to prevent blocking or destruction of the road below. Appellant maintained that complying with the new conditions would involve costs of $60,000 to $70,000 and a period of two to three years.

Appellant filed a cross-complaint on March 4, 2004, which is not in the appellate record, nor are any

subsequent amendments.[2] The court's judgment and an unstamped copy of the second amended cross-complaint, however, indicate that appellant named not only the County but also several individual County employees. Appellant's claims against all of the cross-defendants apparently consisted of violations of his civil rights, under 41 U.S.C. section 1983 – specifically, the rights of free speech, equal protection, and due process – and abuse of process. He further alleged improper taxation against the County, in violation of article XIIIA, section 4, of the California Constitution. Among the specific allegations was the assertion that multiple ordinances enacted by the County were "vague and unconstitutional," thus creating "a climate of fear in the community," a chilling effect on free speech, and the ability of County officials to act arbitrarily in violation of citizens' rights to due process and equal protection.

On November 14, 2006, the County and the individual cross-defendants moved for summary judgment, contending that (1) appellant had failed to exhaust his administrative remedies because he did not appeal the Planning Commission's decision to the Board of Supervisors or seek a writ from superior court; (2) appellant had failed to join the Coastal Commission, an indispensable party because it had "mandated" the ordinances at issue; and (3) the

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[2] The augmented record contains a signed, but not filed, copy of a "Second Amended Cross-Complaint," and a motion to file a third amended complaint.

County was immune from lawsuits of this nature under Government Code section 818.4.

In its March 23, 2007 order the superior court rejected the cross-defendants' argument that the Coastal Commission should have been joined as an indispensable party, and it permitted withdrawal of the immunity argument. The court also found that one of the ordinances challenged in appellant's second amended cross-complaint, section 20.90.020[3] of the County's Coastal Implementation Plan, was unconstitutionally vague. It further ruled, however, that as to the first through fourth causes of action (violation of civil rights and improper taxation), appellant had failed to exhaust his administrative remedies. The court therefore granted summary adjudication in favor of the County and the individual cross-defendants in their official capacities, and it dismissed these causes of action with prejudice.[4]

On April 1, 2008, the court heard arguments on the County's demurrer to appellant's third amended complaint, which is not in the record, but which

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[3] All section references are to Title 20 of the Monterey County Code, the Coastal Implementation Plan, except as otherwise stated.

[4] What happened to the fifth cause of action, for abuse of process, is not clear, as it is not mentioned in the court's written order. Appellant states (without citation to the record) that the court dismissed it. The clerk's minutes of that hearing, however, indicate that the cross-defendants' motion was withdrawn as to this cause of action.

apparently added two new causes of action.[5] At the hearing on the demurrer appellant attempted to refute the County's assertion of a time bar by arguing that the Planning Department should have "sent" him to the Board of Supervisors; if that decision were against him, he would have had 10 days to go to the Coastal Commission. The Planning Commission, appellant argued, had no jurisdiction, so there was "nothing to exhaust." Appellant noted that after he was told that he had failed to exhaust his administrative remedies, he then "was free" to appeal to the Board of Supervisors and then to the Coastal Commission, both of which rejected his appeal. The court sustained the demurrer to both of the new causes of action with leave to amend and proceeded to consider motions to strike and other matters.

A court trial on the County's complaint began on October 6, 2008. The County sought to preclude any evidence challenging the Planning Commission's decision because appellant had failed to appeal it to the Board of Supervisors or the Coastal Commission, or to seek judicial review by writ of administrative mandate. Appellant argued that the requested injunction would be contrary to law because it would

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[5] The augmented clerk's transcript contains only appellant's motion to file the third amended complaint and a copy of the proposed pleading. In that motion appellant sought to add two new claims based on a February 2006 appeal of the April 2003 Planning Commission decision to the Board of Supervisors and a February 2007 appeal to the Coastal Commission.

preclude acts that occurred after the County filed the action. The County countered that appellant had not abated any of the conditions that were before the Planning Commission, and its decision was therefore final for res judicata purposes. The court granted the motion in limine, noting that the issue of appellant's failure to appeal from the Planning Commission's decision had been discussed six months earlier at the April 1, 2008 hearing. It then considered and granted a motion to amend the County's complaint to allege a violation of section 20.90.050 of the Monterey County Code, which deemed any violation of a condition of a permit to be a public nuisance. Finally, the court heard argument on the County's request for an injunction and granted it.

Returning to the cross-action in February 2009, the court heard and ruled on another motion for summary judgment and summary adjudication by the County on the individual cross-defendants' behalf. On February 24 the court granted judgment on the pleadings with respect to appellant's facial challenge to Monterey County Code section 20.90.020, finding it constitutionally valid. The court again denied summary judgment as to the County employees in their individual capacities and that matter was set for jury trial.

On July 30, 2009, the court heard both parties' motions in limine, none of which is in the appellate record. On August 7, 2009, the parties stipulated to dismissal without prejudice of his claims against the individual cross-defendants in their individual

capacities. Taking this dismissal together with the March 2007 dismissal of them in their official capacities, the court entered judgment for these County employees. On the same day, August 21, 2009, the court entered judgment for the County on its complaint, finding the existing conditions of appellant's property to be a violation of his permit and sections 20.90.040 and 20.90.050. The court declared appellant's property to be a public nuisance "with respect to the development of a caretaker's unit on the property," enjoined him from maintaining that nuisance, and ordered him to abate the offending conditions.

Discussion

1. Summary Adjudication

As noted earlier, the March 23, 2007 summary adjudication ruling was directed at the first through fourth causes of action, which alleged violation of appellant's civil rights and improper taxation. The court agreed with the cross-defendants that appellant had failed to exhaust his administrative remedies. We review this ruling de novo, deciding independently whether cross-defendants, as the moving parties, met their initial burden of affirmatively showing that appellant's claims had no merit. (Code Civ. Proc., § 437c, subd. (f)(1).) More specifically, "[w]e apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case." (*Citizens for Open*

Government v. City of Lodi (2006) 144 Cal.App.4th 865, 873.)

Because review of summary judgment or summary adjudication is defined by the issues raised in the pleadings, we first direct our attention to the material allegations of appellant's second amended cross-complaint.[6] The first three were claims of civil rights violations based on 41 U.S.C. section 1983. In the first cause of action appellant alleged that cross-defendants had penalized him "in retaliation for and to inhibit his exercise of protected First Amendment activities, and by treating [him] in a matter differently from similarly situated persons." The second cause of action alleged a denial of equal protection, in that cross-defendants had imposed conditions on him that were not imposed on similarly situated persons, pursuant to a county "policy and/or custom under which C[ounty] officers and policymakers ratified said disparate treatment" of him. The third cause of action was a due process allegation based on the stop-work order on his construction project, "without the constitutionally required prior due process notice and without any pre-order hearing." The fourth cause of action asserted a violation of article XIIIA, section 4, through the collection of "excessive service fees" for filing permit applications and for appealing "illegal and/or capricious action by a C[ounty] official."

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[6] We will assume that the document in the augmented record is an accurate copy of this pleading even though it is not file-stamped.

Appellant has not included the moving party's separate statement of undisputed facts in the record on appeal, so we are unable to ascertain the factual support for the challenged motion. The appellate record also lacks the points and authorities in support of the summary judgment motion[7] and much of the reporter's transcript of the summary judgment hearing.[8] Appellant maintains that the missing documents are unnecessary because the essential facts are undisputed. In his own separate statement, however, he listed 12 "disputed material facts." We will review the summary adjudication ruling based on the record before us and the law applicable to administrative decisions.

"The exhaustion doctrine precludes review of an intermediate or interlocutory action of an administrative agency. [Citation.] A party must proceed through the full administrative process 'to a final decision on the merits.' [Citation.]" (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489 (*Newhall*).) "'The rule is . . . not a matter of judicial discretion, but is a fundamental

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[7] We do have the cross-defendants' written *reply*, which contains (in the very last sentence) the only indication that there was an alternative request for summary adjudication. Summary adjudication should not be granted when only summary judgment has been requested. (See *UDC-Universal Development v. CH2M Hill* (2010) 181 Cal.App.4th 10, 25.)

[8] In his Notice Designating Reporter's Transcript, appellant designated only pages 71-72 and 84-121 of this hearing transcript.

rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts.'" (*Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 293.)

"The primary purpose of the doctrine 'is to afford administrative tribunals the opportunity to decide in a final way matters within their area of expertise prior to judicial review.' [Citation.] 'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' [Citations.] The doctrine prevents courts from interfering with the subject matter of another tribunal. [Citation.] [¶] Another basic purpose of the doctrine '"'is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' [Citation.] Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]"'" (*Citizens for Open Government v. City of Lodi, supra,* 144 Cal.App.4th at p. 874; see also *Newhall, supra,* 161 Cal.App.4th at p. 1489 [exhaustion requirement promotes administrative efficiency

and judicial economy, allowing agency to develop the necessary factual background, apply its expertise, and exercise its statutory discretion].) Thus, "'[i]f an appeal can be taken to a higher administrative body . . . that appeal must be pursued and the issues must be presented to the final decisionmaker before they can be presented in court.'" (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 285.)

As appellant points out, the doctrine is subject to exceptions. Exhaustion of administrative remedies is not required, for example, when it appears that the agency is without subject matter jurisdiction, when pursuit of administrative remedies would be futile, or where irreparable harm will result if judicial intervention is withheld until a final administrative decision is rendered. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1081 (*Coachella*); *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827.)

Appellant invokes multiple exceptions, arguing essentially that exhaustion was not required because (1) the Planning Commission did not have jurisdiction to hear the issues raised in the cross-complaint; (2) the Planning Commission's decision was quasi-legislative, not quasi-judicial; (3) any administrative success would have been inadequate and "futile"; (4) he still had important causes of action for violations of due process and equal protection; and (5) the exhaustion defense was barred by the doctrine of laches.

a. Jurisdiction of the Planning Commission

Appellant first argues that he did not have to appeal the Planning Commission's decision to the Board of Supervisors because he should not have been presenting issues to the Planning Commission in the first place. According to appellant, the Planning Department made a discretionary decision, not an administrative one, when it ordered him to restore the property. That decision should have been appealed directly to the Board of Supervisors; thus, "[t]he Planning Department sent Appellant to the wrong venue," and "the County should be estopped from asserting the failure to exhaust remedies defense."

Appellant does not elaborate on his assertion of estoppel or explain how the requirements for estoppel are met here. Furthermore, appellant's position is not supported by the ordinances he cites. The Director of Planning and Building Inspection and its subordinates have the authority to enforce the provisions of the County's coastal development plan, and to enlist other County departments in the effort to discharge this duty. In its letter to appellant in April 2003 the Planning Department advised appellant that his coastal permit could not be amended administratively, but must be taken to the Planning Commission. The Department also informed appellant of his right to contest the restoration requirement by appealing to the Planning Commission. This was not incorrect advice. The Planning Commission was authorized to determine that no violation of Title 20 had occurred

(§ 20.90.110) and to hear disputes over applications for amendment of permits (§§ 20.70.030, 20.70.105B). Appellant correctly followed the procedures outlined in sections 20.90.110 and 20.88.010-20.88.040 for appealing administrative decisions and interpretations of the zoning ordinances. Section 20.86.010-030 merely states that a person or agency dissatisfied with any discretionary decision of the Planning Department director, Zoning Administrator, or Planning Commission *may* appeal to the Board of Supervisors. No procedural error occurred in bringing the matter first to the Planning Commission for resolution.

Appellant further argues that the Planning Commission "did not have jurisdiction to decide the major issues of Appellant[']s cross-complaint" because there was only one primary right at issue, the injury caused by the order to restore the property. Appellant's claims for damages and challenge to the "fee schedule" were, in his view, "not relevant to the restoration order" and thus could not have been presented at the hearing before the Planning Commission.

Appellant does not suggest what course of action he should have taken, but clearly he did not avail himself of another forum to be heard on these claims. If the Planning Department was confining its directions and advice to the restoration order, it was incumbent on appellant himself to bring any unrelated issues to the proper forum.

Appellant next contends that the restoration ordinance was inapplicable to him because it accords "too broad of a delegation of power to an official" without "standards or safeguards for guidance." "Because the restoration ordinance was a violation of due process, it fails for vagueness, and the Planning Commission action [*sic*] was without jurisdiction to act." Setting aside the point that this constitutional challenge was rejected by the superior court, it does not resolve the procedural question of why the Planning Commission had no jurisdiction to hear the matter. Moreover, if the restoration ordinance was in fact unconstitutional, then no agency could have legally enforced it, and appellant then could have sought judicial review in a writ proceeding.

A similar result must meet appellant's argument that the Planning Commission had no jurisdiction because section 20.90.130 pertains to *applications* for permits; that is, since he already had a permit, the ordinance did not apply to him: "so the Planning Department could not order the property restored, the Planning Commission did not have jurisdiction, and any action taken was void at the outset, and there was nothing for Appellant to appeal, or exhaust." In other words, no restoration could be ordered once a permit is obtained, even when, as here, a violation plainly appears upon inspection of the work in progress. It is not evident that appellant raised this argument to the Planning Department or the Planning Commission, and he offers no reason why they could not have heard his objection. In any event,

appellant's coastal development permit did not make him immune to remedial action upon a violation of the permit conditions; the permit could be revoked, modified, or amended. (§ 20.70.010 et seq.) Chapter 20.88 (§§ 20.88.010-20.88.060) governing appeals by any "person aggrieved" by an administrative decision or interpretation of any part of Title 20, broadly encompasses challenges of the nature now asserted. Thus, there is no reason appellant could not legally have brought this challenge to the Planning Commission for an initial decision.

b. Quasi-legislative Action

Appellant next contends that he "did not have to appeal the Planning Commission decision" because it was "quasi-legislative and not quasi-judicial, and did not require further exhaustion of remedies by appeal." In support of this position, appellant (with an incorrect citation) relies on *Langsam v. Sausalito* (1987) 190 Cal.App.3d 871, where the appellate court found a city council's construction of a parking ordinance to be quasi-legislative rather than quasi-judicial, because its action "sought to effectively amend an existing law through the guise of an adjudicatory process." (*Id.* at p. 882.) The court there noted that the council was concerned with the interests of its constituents, and its discussion of the issue was colored by political overtones. (See also *Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal.App.3d 249, 260 [redevelopment agency's decision to condemn property for redevelopment was a fundamental

political question and therefore a quasi-legislative act.])

This case, however, bears no resemblance to *Langsam*. The Planning Commission did not construe any ordinance so as to amend it; indeed, any such amendment would have been beyond its authority. Its decision was not directed at establishing a policy for the surrounding community but was confined to appellant's property and the remediation of violations under *existing* ordinances. As such, it was quasi-adjudicatory and subject to the doctrine of exhaustion of administrative remedies. As appellant did not pursue the entire course of administrative appeals, his action in superior court was foreclosed.

c. Futility

Appellant further complains that an appeal to the Board of Supervisors would have been futile because any success before that body would have resulted only in a reversal of the restoration order, leaving a costly and time-consuming process of obtaining a new permit. The futility exception, however, "is very narrow and will not apply unless the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1126.) Indeed, for this exception to apply "it is not sufficient that a party can show what the agency's ruling would be on a particular *issue or defense*. Rather, the party must show what

the agency's ruling would be '"on a particular case."'" (*Coachella, supra,* 35 Cal.4th at p. 1081; *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) Appellant has not demonstrated that he would have achieved only a partial success. But even if we agreed with appellant that it would have been futile to seek review by the Board of Supervisors, he does not show why he could not have sought recourse by a writ of mandate. "[The] requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. [Citation.] Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation.] Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.' (*Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 646. . . .)" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)

d. Constitutional Claims

In an argument similar to his jurisdictional claim, appellant asserts that he "did not have to appeal the Planning Commission decision [because] the action of the Planning Commission was a violation of due process." The premise of this argument is that the ordinance providing for restoration orders was unconstitutionally vague, and that he was "singled out for punishment" by the Planning Department in

retaliation for his article criticizing the Department in the local newspaper. Along the same lines he repeats the excuse that this retaliatory act was a violation of his rights to free speech and equal protection.

But appellant still does not explain why he could not have asserted these claims in the administrative proceeding or alternatively why he failed to seek a judicial remedy by writ of mandate. "Even where an ordinance is challenged on the ground that it is void as applied to a particular property, the challenger generally must first exhaust all available administrative remedies before asserting his claim in court." (*McAllister v. County of Monterey*, *supra*, 147 Cal.App.4th at p. 285; see also *U.S. v. Superior Court* (1941) 19 Cal.2d 189, 195 ["even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief"].) The exception for procedural due process issues is inapplicable "'[i]f the [administrative remedy] provides for reasonable notice and a reasonable opportunity to be heard.'" (*Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486.)

Appellant's reliance on *Carpintería Valley Farms v. County of Santa Barbara* (9th Cir. 2003) 344 F.3d 822 does not answer this question or help him in any way. There the landowner was permitted to assert constitutional violations (procedural due process, First Amendment, and equal protection) resulting

from retaliation by the defendant county with respect to events that were not time-barred. Those *timely filed* claims were not "as applied" takings claims and thus were ripe for judicial review even without further action by the county. (*Id.* at pp. 829-830.)

Here there is no basis for concluding that appellant could not have brought all of his claims to the attention of the Planning Commission – and failing that effort, to the Board of Supervisors or Coastal Commission, as he was invited to do in the Planning Commission's decision. The second amended cross-complaint focused not on any *facial* invalidity of the county ordinances but on the violation of appellant's civil and constitutional rights in the *application* of the ordinances to his property. These matters could have been brought before the Board of Supervisors or the Coastal Commission had appellant pursued his administrative appeal rights.

e. Laches

Appellant further maintains that "the County's affirmative defense of failure to exhaust administrative remedies, and the grant of summary adjudication, and [*sic*] are barred by the doctrine of laches as a result of a two plus years delay in filing the Motion for Summary Judgment."[9] We disagree.

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[9] Appellant filed his cross-complaint March 4, 2004. The County and individual defendants filed their summary judgment motion two and one half years later, on November 14, 2006.

Laches, when asserted as a *defense*, "requires unreasonable delay plus either acquiescence in the act about which plaintiff complains [fn. omitted] or prejudice to the defendant resulting from the delay." (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359.) A trial court has wide discretion in deciding whether laches applies in a given case. "Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his burdens of proof and the production of evidence on the issue. . . . Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624; *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 519-520 [appellate court will not interfere with trial court's decision on laches question unless it is "obvious a manifest injustice has occurred or the decision lacks substantial support in the evidence"].)

Appellant contends that he was prejudiced by the delay between his cross-complaint and the filing of the summary judgment motion, during which time the County filed an anti-SLAPP motion and he expended "tens of thousands of dollars" in attorney

fees.[10] He further contends that the County acquiesced in the cross-complaint by engaging in discovery, meet-and-confer and case management conferences, and numerous other acts during the litigation. Accordingly, the County "should be estopped to assert the exhaustion of remedies defense because of the numerous acts of acquiescence, which alone can defeat the exhaustion defense, even if no prejudice is shown."

Appellant's assertion of laches (which he appears to assume is interchangeable with estoppel) cannot succeed. First, appellant does not show how the protracted course of the *litigation* excused his failure to raise issues *before* the dispute reached superior court. Second, he reargues the position he took in opposition to the summary judgment motion without making any attempt to demonstrate abuse of discretion or other error in the superior court's implied rejection of his laches theory. Furthermore, appellant cites no authority precluding a summary judgment motion merely because more than two years had

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[10] Appellant refers to an anti-SLAPP motion which he represented by declaration to have been unsuccessfully brought by the County in June 2004, three months after he filed his cross-complaint. In that motion, appellant represented, the County had asserted the bar of exhaustion of administrative remedies. Appellant's assertion of prejudice from the expenditure of attorney fees is based on a representation by appellant at the summary judgment hearing; the court accepted the representation that he had paid these fees, though it found no relevance to the fact.

elapsed since the filing of his cross-complaint while other motions were heard.

f. Excessive Fees

Appellant's fourth cause of action alleged that the County had been violating article XIIIA, section 4, of the California Constitution by collecting "excessive service fees for purposes of revenue, unrelated to the cost of providing the services and unrelated to the benefits derived by the applicant."[11] From the general allegations of the pleading it appears that the focus of the excessiveness challenge is the filing fee of $10,840 or the "appeal process" fee of "almost $5,000." He also mentioned $40,000 to $60,000 in "fees" which he estimated he would have to pay to contractors and a geologist to start the construction process "all over again." In his February 2007 notice of appeal to the Board of Supervisors, he sought a finding that $8,433 was an unconstitutional amount in filing fees imposed by the Planning Department.

The trial court's summary adjudication order expressly disposed of the fourth cause of action through the finding that appellant should have exhausted his administrative remedies on this claim.

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[11] This provision states: "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district."

Appellant contends that the County "did not specifically challenge this cause of action, and as a result it was never researched, briefed, or argued." Consequently, appellant believes, he "should not be required to respond to this new attack with so little time to research and write. This issue should be sent back to the trial court for discovery and appropriate noticed motions."

We cannot grant appellant the relief he seeks. Appellant did not designate the County's points and authorities in the appellate record, so we have no way to evaluate his claim that the County did not challenge the fourth cause of action in its summary judgment motion. What we do have is the notice of motion, the County's written reply to appellant's opposition, and the designated portions of the reporter's transcript of the hearing. The court's ruling indicates that it agreed with the County that the fourth cause of action was among those subject to the exhaustion rule.

Appellant repeats his prior arguments disputing the applicability of the exhaustion requirement, noting in this context that the passage of "the ordinance establishing the service fees" was a legislative act. He does not identify which fee ordinance was unconstitutional, however, nor does he explain why he could not have raised this argument to the Planning Commission or appealed on this ground to the Board of Supervisors. (Cf. *Steinhart v. County of Los Angeles, supra,* 47 Cal.4th 1298 [exhaustion doctrine

applied to taxpayer's failure to seek administrative remedy for unfair property reassessment claim].)

2. Constitutionality of Ordinances

Appellant next challenges the denial of his motion for permanent injunctions against enforcement of several County ordinances on due process grounds. In its summary adjudication order the trial court ruled that appellant should have exhausted his administrative remedies as to his facial challenges to these ordinances.[12] He specifically takes issue with the "red tag" procedure of stopping work on a project without affording prior notice of the violations (§ 20.90.090(G)); the delegation by the Board of Supervisors of authority to shut down a building project or to take other action to enforce Title 20, the Coastal Implementation Plan provisions (§ 20.90.020); the restoration ordinance (§ 20.90.130); the ordinance providing for variances (§ 20.78.020) and the ordinance providing for proposed amendments to any coastal development permit (§ 20.70.105) Appellant

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[12] As noted earlier, the court denied summary adjudication as to one of the ordinances, section 20.90.020, but later granted judgment on the pleadings, finding no invalidity of this provision. The 2007 summary adjudication order itself is perplexing, since the court had already granted the motion as to the first four causes of action, but then granted it "as to the due process facial challenge" to all but one of the identified ordinances. sections of the. [sic] With inapplicable exceptions, summary adjudication is not properly granted on issues or *theories,* but is confined to causes of action. (Code Civ. Proc., § 437c, subd. (f)(1).)

has also invoked several "unconstitutional as applied" challenges as to these provisions and others,[13] which were subject to the exhaustion rule and therefore will not be addressed on appeal.

Appellant has not shown error in the denial of the injunctions. Section 20.90.090 contains an express notice provision, followed by an explanation of the ensuing procedures for challenging the stop-work order in section 20.90.100 et seq. With these procedures in place, anyone believing that discriminatory enforcement has occurred has an opportunity to raise those concerns and be heard. Nothing in those ordinances themselves grants County officials uncontrolled discretion to restrict construction through arbitrary means. Thus, both sections 20.90.090 and 20.90.020[14] are facially valid.

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[13] Appellant's challenges to sections 20.145.080(A)(b)(4) (when geologic reports are required), 20.06.1030 and 20.56.570 (defining "front setback" and "front wall," respectively), and 16.12.060 (requiring erosion control plans for permits) are directed at County's application of these provisions to his case.

[14] Section 20.90.020 grants the Planning Department the authority to investigate "all reported or apparent violations" of Title 20. If the Director finds reasonable cause to believe that a violation does exist, he or she may "take such measures as he deems necessary or expedient to enforce and secure compliance with the provisions of this Title, including measures ordering the immediate restoration of a degraded site to pre-violation, natural conditions in a manner that will not further degrade the environment." In its earlier summary adjudication ruling the trial court found unconstitutional vagueness in the words "he deems necessary or expedient." In its February 24, 2009 ruling

(Continued on following page)

As for section 20.90.130, the restoration ordinance, the appellate record contains no admissible evidence to support the assertion that "[t]his is a difficult ordinance for a person of ordinary intelligence to understand." Similarly, we cannot find section 20.78.020 unconstitutionally vague on the unsupported assertion that "variances are notoriously difficult to obtain."[15] The rest of appellant's challenge to this ordinance is specific to his situation and thus was a matter for determination through the administrative appeal process. Section 20.70.105 likewise is not facially vague; it clearly applies to amendments of coastal development permits.[16] Appellant's other complaints regarding this provision are "as applied" grievances which should have been determined through the administrative process.

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granting judgment on the pleadings, however, it determined that "as he deems necessary or expedient" was not unconstitutionally vague. Appellant does not renew his vagueness challenge to this provision.

[15] This provision states only that "[m]odifications to the setback, coverage, height, building site area, floor area ratio and development standard regulations of this Title may be considered by a Variance."

[16] This section is part of chapter 20.70, pertaining to coastal development permits. It provides, in pertinent part, "Proposed amendments to any permit issued *under the provisions of this Chapter* shall be submitted to the Planning And Building Inspection Department in writing and in sufficient detail to adequately assess the nature of the amendment and any potential impacts of the amendment." (Italics added.)

3. *Evidentiary Rulings*

Appellant next contends that the trial court erred in granting the County's motion in limine precluding testimony at the upcoming trial. "The court's orders on motions in limine are reviewed for abuse of discretion [citation], except where the grant of a motion in limine excludes all the evidence relevant to a particular claim and thereby disposes of an entire cause of action. In that situation, the appellate court should apply the standard applicable to a motion for nonsuit – whether the evidence presented by the plaintiff was insufficient to permit a jury to find in the plaintiff's favor." (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 385.)

In this case, however, we are unable to review appellant's argument, because we lack any record of the motion or the proceedings. Appellant's opposing points and authorities is insufficient alone to convey the legal basis of the motion or its merit or the reasoning of the trial court. We must therefore presume that the court considered the grounds for the motion and its opposition, and properly exercised its discretion to preclude the evidence appellant sought to introduce. "It is the appellant's affirmative duty to show error by an adequate record. [Citation.]" (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) A judgment or order of the trial court is presumed correct, and a "'necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error [on only] the part of the record he provides the trial court, but ignores or

does not present to the appellate court portions of the proceedings below [that] may provide grounds upon which the decision of the trial court could be affirmed.' [Citation.]" (*Ibid.; Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) For the same reason, we cannot consider appellant's challenge to the ruling on the County's motions in limine before trial against the individual cross-defendants, which was scheduled for August 24, 2009.

4. Sanctions

On February 15, 2007, appellant moved for sanctions against the County for its refusal to provide certain documents during discovery. In his declaration he stated that he had paid his attorneys $28,460 "in relation to the Production of Documents and County's Motion to Quash." At a hearing on May 14, 2007, the court denied appellant's motion to strike the County's opposition and ruled that appellant was entitled to sanctions of $8,000. The court filed its order on June 25, 2007, expressly finding "no substantial justification for the County's position opposing discovery." The court therefore ordered the County to pay $8,000 for appellant's attorney fees "as a sanction for Counties [*sic*] misuse of the discovery process," along with $1,439.75 for appellant's costs.

Appellant contends that the court abused its discretion by not granting him all of the attorney fees he had requested. Again, however, we are unable to find error, because we lack a sufficient record of the

proceedings. We are not reviewing appellant's motion de novo; instead we must determine only whether the lower court's ruling was arbitrary or irrational. "In choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason." (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) Accordingly, "[s]ancti on orders are 'subject to reversal only for arbitrary, capricious or whimsical action.'" (*Liberty Mut. Fire Ins. Co. v. LcL Adm'rs, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) Appellant has not provided the County's opposition or a reporter's transcript of the hearing on the motion, so it is impossible to determine how the court arrived at the amount it awarded. "Appellant must affirmatively show error by an adequate record; error is never presumed." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448; see also *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [burden is on party challenging fee award to provide an adequate record on appeal to assess error].) Because the appellate record provides us with an insufficient basis on which to assess the merits of the motion or the court's reasoning in deciding it, we must presume the order was within the bounds of the court's broad discretion in setting the amount of sanctions.

Disposition

The judgment is affirmed.

ELIA, Acting P. J.

WE CONCUR:

MIHARA, J.

McADAMS, J.

County of Moneterey v. Burleigh
H034942

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

William B. Burleigh
1 Paso Honda
Carmel Valley, CA 93924

RE: COUNTY OF MONTEREY, et al.
Plaintiff, Cross-defendants and Respondents,
v.
WILLIAM B. BURLEIGH,
Defendant, Cross-Complainant and Appellant.

H034942
Monterey County No. M67206

* * REMITTITUR * *

I, MICHAEL J. YERLY, Clerk of the Court of Appeal of the State of California, for the Sixth Appellate District, do hereby certify that the opinion or decision entered in the above-entitled cause on October 05, 2010, has now become final.

___ Appellant ✓ Respondent to recover costs
___ Each party to bear own costs
___ Costs are not awarded in this proceeding
___ See decision for costs determination

Witness my hand and the seal of the Court affixed at my office on DEC 17 2010

{SEAL} MICHAEL J. YERLY, Clerk

By: BETH MILLER
Deputy

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COUNTY OF MONTEREY, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

COUNTY OF MONTEREY,

Plaintiff and Real Party In Interest,

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

WILLIAM B. BURLEIGH TRUST, WILLIAM B BURLEIGH; and DOES I through XX, inclusive,

Defendants.

Case No. M 67206

~~[PROPOSED]~~ **JUDGMENT AND INJUNCTION**

(Filed Aug. 21, 2009)

WILLIAM B. BURLEIGH,

Cross-Complainant,

vs.

THE COUNTY OF MONTEREY, et al.,

Cross-Defendants. /

INTRODUCTION

Plaintiff County of Monterey ("County") filed a complaint on October 8, 2003, against the William B. Burleigh Trust and Cross-Complainant William B. Burleigh ("Burleigh"). The complaint seeks an injunction, abatement of Monterey County Code violations, abatement of A public nuisance, and the recovery of attorneys' fees and costs.

Burleigh filed a series of cross-complaints which stated claims against the County and certain other cross-defendants. On March 16, 2007, after hearing, the Court granted summary adjudication as to all cross-claims against the County, with the exception of a facial challenge to Section 20.90.020 of the Monterey County Code. On February 24, 2009, after hearing, the Court granted Judgment on the Pleadings in favor of the County as to the facial challenge to Monterey County Code Section 20.90.020.

Trial on the County's Complaint came on regularly for hearing on October 6, 2008, in Department 15 of the Monterey County Superior Court, Justice Kenneth Andreen presiding by assignment. Kathryn

Reimann, Deputy County Counsel, appeared on behalf of the County. William Burleigh appeared in pro per.

After reading, hearing argument on, and considering the matters presented, including Motions in Limine filed by the County, it appears to the satisfaction of this Court that the County has met its burden and is entitled to judgment in its favor on the complaint.

Reference to the final determination of the Monterey County Planning Commission dated October 29, 2003, including the documents provided at administrative hearing and the transcript thereof and including Planning Commission Resolution No. 03072, demonstrates that the County proved that Burleigh (1) cut and graded into a hillside without a permit, that (2) the location of that cut was adjacent to, and damaged a redwood tree in violation of an express condition that the tree be "protected," (3) that the location of the building being constructed did not correspond to the location on the approved permit plans, and (4) that the location of the construction included slopes in excess of 30%, for which no permit had been authorized. This determination was not appealed or otherwise challenged by Burleigh, and is binding upon this Court.

ACCORDINGLY, IT IS HEREBY DECLARED, ORDERED AND ADJUDGED:

1. The existing conditions of the development of a "caretaker's unit" on Assessor's Parcel

Number 419-321-008-000 are in violation of the Coastal Development Permit granted by the County, and in violation of the Monterey County Code including Monterey County Code § 20.90.040 and § 20.90.050;

2. Defendants, William B. Burleigh and the William B. Burleigh Trust, their successors and assigns, are permanently enjoined from maintaining these violations;

3. Defendants' property is declared a continuing public nuisance with respect to the development of a caretaker's unit on the property;

4. Defendants are permanently enjoined from maintaining a public nuisance on the property;

5. Defendants are ordered to abate all conditions which cause the nuisance, including but not limited to:

    a. preparing and submitting for County review and approval, appropriate plans and permit applications to remove all structural aspects of the foundation for the caretaker's unit and fill all trenches and openings;

    b. preparing and submitting for County review and approval, appropriate plans and permit applications to restore that portion of the property in the area of the proposed "caretaker's unit" to its pre-construction condition;

c. causing the plans required by this Order to be prepared by a licensed civil engineer with particular attention to compaction and slope stability issues in the restoration of the hillside;

d. providing for periodic compaction reports from a licensed civil or geotechnical engineer, at 12 inch intervals, in the reconstruction of the hillside; and

e. to provide for an arborist, approved by the County, to be on-site during the placement of fill within the dripline of the redwood tree as part of the restoration of the hillside;

6. Defendants are ordered to acquire all necessary permits no later than March 30, 2010, and to complete all work no later than June 1, 2010, and Defendants do not obtain such permits and complete such work within the time periods set forth above, that Plaintiff and/or its contractors are authorized to accomplish the work and recover the costs from Defendants, their successors and assigns;

7. If before June 1, 2010, Defendants do not fully abate all violations and conditions and undertake the actions described herein, Plaintiff shall recover its costs and fees, including attorneys' fees, for the investigation and prosecution of this action, as well as the costs of any abatement efforts incurred by or on behalf of the County, including any compliance monitoring costs.

8. The County shall recover its costs in this matter.

IT IS SO ORDERED.

Date: August 18, 2009 /s/ Andreen
Kenneth Andreen, Judge

Approved as to form:

/s/ Kay Reimann 8/11/09
Kathryn Reimann Date
Deputy County Counsel
Attorney for County
of Monterey

Approved as to form:

William B. Burleigh Date
In Propria Persona

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

COUNTY OF MONTEREY,

Plaintiff and Real Party In Interest,

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

WILLIAM B. BURLEIGH TRUST, WILLIAM B BURLEIGH; and DOES I through XX, inclusive,

Defendants.

Case No. M 67206

~~[PROPOSED]~~ **ORDER DENYING SUMMARY JUDGMENT AND GRANTING SUMMARY ADJUDICATION**

(Filed Mar. 23, 2007)

WILLIAM B. BURLEIGH,

Cross-Complainant,

vs.

THE COUNTY OF MONTEREY, a Public Entity; MONTEREY COUNTY BOARD OF SUPERVISORS; MONTEREY COUNTY PLANNING AND BUILDING INSPECTION DEPARTMENT, a County Department; SCOTT HENNESSY, ALANA KNASTER, BILL DUNN, JEFF MAIN, LAUTARO ECHIBURU, JOHN FLOYD, CONNIE MENDOZA, and RON ADAMS, and DOES 21-40,

Cross-Defendants. /

Cross-defendants COUNTY OF MONTEREY; MONTEREY COUNTY BOARD OF SUPERVISORS; MONTEREY COUNTY PLANNING AND BUILDING INSPECTION DEPARTMENT; SCOTT HENNESSY; ALANA KNASTER; BILL DUNN; JEFF MAIN; LAUTARO ECHIBURU; JOHN FLOYD; CONNIE MENDOZA; and RON ADAMS have moved for summary judgement with respect to Cross-Complainant WILLIAM B. BURLEIGH's (hereafter "Burleigh") federal claim for civil rights violations Under 42 U.S.C. § 1983. Cross-Complainant opposed the motion and argument was heard on February 2, 2007. FRAN G.

TIESEN and WILLIAM LITT, Deputy County Counsels, appeared for the moving party. WILLIAM B. BURLEIGH appeared in pro pers.

After considering (1) the papers filed in support of and in opposition to the motion and (2) the oral argument of the moving parties and Burleigh, the Court makes the Following Findings:

1. Its rulings herein are not dispositive of all of the issues against all of the Cross-Defendant's theories, therefore County's Motion for Summary Judgment should not be granted.

2. The California Coastal Commission is not an indispensable party to this case.

3. Burleigh was required to exhaust his administrative remedies before proceeding with litigation against the County and the individual Cross-Defendants in their official capacities and he failed to so do. Accordingly, Summary Adjudication should be granted on the First, Second, Third, and Fourth Causes of Action of his Second Amended Cross-Complaint against the County and the individuals Cross-Defendants in their official capacities and they should be dismissed with prejudice. However, the exhaustion doctrine does not inure as to said Cross-Defendants, in their individual capacities, and Summary Adjudication should be denied as to them.

4. The Court finds that one of Burleigh's theories against County survives this motion. In his Second-Amended Cross-Complaint alleged at page 9,

lines 15-18, Burleigh alleges that various sections of the Monterey County Zoning Ordinances " . . . are vague and unconstitutional" and that this is adequate to plead a facial due process theory for recovery. However, the Court has reviewed the enumerated sections to determine if they represent discretionary delegation of authority to the County by the State pursuant to the California Coastal Act and as such are subject to application of the exhaustion of administrative remedies doctrine or if all or any of the sections are unconstitutionally vague and consequently, not subject to said doctrine. The Court finds that all of the sections in question are valid delegations of discretionary authority and Summary Adjudication therefore granted as to said sections, saving and excepting Section 20.90.020. Section 20.90.020 is unconstitutionally vague because of the language " . . . he deems necessary or expedient," and accordingly Summary Adjudication should be denied against Burleigh's facial due process challenge against County, as to this section. The County is not barred from bringing a later Motion for Summary Judgment/Summary Adjudication, after reasonable discovery is completed, to test the validity of Burleigh's theory and citing appropriate Constitutional authority.

5. The Court allows County to withdraw its affirmative defense of governmental immunity, and makes no ruling on the merits thereon.

NOW, THEREFORE, THE COURT ORDERS:

1. County's Motion for Summary Judgment is denied.

2. Summary Adjudication is granted as to Burleigh's First, Second, Third, and Fourth Causes of Action against the County and the individual Cross-Defendants in their official capacities and this portion of the Cross-Complaint is dismissed with prejudice. These causes of action remain as to the individual defendants in their individual capacity.

3. Summary Adjudication is granted as to the due process facial challenge against all of the alleged sections of the Monterey County Zoning Ordinances, saving and excepting Section 20.90.020 (Second-Amended Cross-Complaint page 9, lines 17-18) and it is denied as to said Section only. The County is not barred from bringing a later Motion for Summary Judgment/Summary Adjudication, after reasonable discovery is completed, to test the validity of Burleigh's theory, citing appropriate Constitutional authority.

DATED: 3/16, 2007.

/s/ Andreen
KENNETH ANDREEN,
JUDGE OF THE
SUPERIOR COURT

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF MONTEREY, et al.
Plaintiff, Cross-defendants and Respondents,
v.
WILLIAM B. BURLEIGH,
Defendant, Cross-Complainant and Appellant.

H034942
Monterey County No. M67206

(Filed Oct. 26, 2010)

BY THE COURT*:

Appellant's petition for rehearing is denied.

Date: OCT 26 2010 ELIA, J. ACTING P.J.

* Before Elia, Acting P.J., Mihara, J., and McAdams, J.

Court of Appeal,
Sixth Appellate District – No. H034942

S187979

IN THE SUPREME COURT OF CALIFORNIA

En Banc

COUNTY OF MONTEREY, et al., Plaintiffs,
Cross-Defendants and Respondents,

v.

WILLIAM B. BURLEIGH, Defendant,
Cross-Complainant and Appellant.

(Filed Dec. 15, 2010)

The petition for review is denied.

GEORGE
Chief Justice